

**BOIES SCHILLER FLEXNER LLP**

David Boies (admitted pro hac vice)

333 Main Street

Armonk, NY 10504

Tel: (914) 749-8200

dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165

Beko Reblitz-Richardson, CA Bar No.

238027

Erika Nyborg-Burch, CA Bar No. 342125

44 Montgomery St., 41st Floor

San Francisco, CA 94104

Tel.: (415) 293-6800

mmao@bsfllp.com

brichardson@bsfllp.com

enyborg-burch@bsfllp.com

James Lee (admitted pro hac vice)

Rossana Baeza (admitted pro hac vice)

100 SE 2nd St., 28th Floor

Miami, FL 33131

Tel.: (305) 539-8400

jlee@bsfllp.com

rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334

725 S Figueroa St., 31st Floor

Los Angeles, CA 90017

Tel.: (213) 995-5720

alanderson@bsfllp.com

**SUSMAN GODFREY L.L.P.**

Bill Carmody (admitted pro hac vice)

Shawn J. Rabin (admitted pro hac vice)

Steven M. Shepard (admitted pro hac vice)

Alexander Frawley (admitted pro hac vice)

1301 Avenue of the Americas, 32nd Floor

New York, NY 10019

Tel.: (212) 336-8330

bcarmody@susmangodfrey.com

srabin@susmangodfrey.com

sshepard@susmangodfrey.com

afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891

1900 Avenue of the Stars, Suite 1400

Los Angeles, CA 90067

Tel.: (310) 789-3100

abonn@susmangodfrey.com

**MORGAN & MORGAN**

John A. Yanchunis (admitted pro hac vice)

Ryan J. McGee (admitted pro hac vice)

201 N. Franklin Street, 7th Floor

Tampa, FL 33602

Tel.: (813) 223-5505

jyanchunis@forthepeople.com

rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805

711 Van Ness Ave, Suite 500

San Francisco, CA 94102

Tel: (415) 358-6913

mram@forthepeople.com

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,

JEREMY DAVIS, CHRISTOPHER

CASTILLO, and MONIQUE TRUJILLO

individually and on behalf of all other

similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**[PROPOSED] ORDER DENYING  
DEFENDANT'S MOTION TO EXCLUDE  
OPINIONS OF PLAINTIFFS' EXPERT  
BRUCE SCHNEIER (DKT. 664)**

The Honorable Yvonne Gonzalez Rogers

Courtroom 1 – 4th Floor

Date: September 20, 2022

Time: 2:00 p.m.

Before the Court is Google's motion to exclude all opinions offered by Plaintiffs' expert Bruce Schneier, Dkt. 664, ("Google's Motion"), including every opinion proffered in Professor Schneier's April 15, 2022 opening expert report (Dkt. 608-7) ("Schneier Report") and every opinion proffered in Professor Schneier's June 7, 2022 rebuttal expert report (Dkt. 608-6) ("Schneier Rebuttal").

Having considered the parties' papers filed in support of and in opposition to Google's Motion, and all other matters properly considered by this Court, the Court **DENIES** Google's Motion.

"Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014). Courts should screen "unreliable nonsense opinions, but not exclude opinions merely because they are impeachable." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010).

Google argues that all 20 of Schneier's opinions should be excluded in their entirety. Google's Motion can be divided into six arguments. The Court rejects all of them.

*First*, Schneier Opinions 1-6 regarding data and privacy provide relevant context for other opinions. Google's complaint that such opinions "have no specific application whatsoever" has no bearing on the admissibility of "background" or "teaching" testimony under Rule 702:

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. ... For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

1 *Id.* Rule 702, Advisory Committee Notes. Google does not (and could not) dispute that Schneier  
2 is qualified to testify regarding online privacy, that a lay juror would not be assisted by his  
3 knowledge about the subject, or that his testimony on the subject is broadly unreliable. Indeed,  
4 Plaintiffs’ claims for intrusion on seclusion and invasion of privacy in particular place the overall  
5 context of Google’s collection of private browsing information and the risk of its disclosure  
6 squarely in issue.

7       *Second*, Schneier is qualified to opine on the likely effect of Google’s disclosures on  
8 reasonable users. (Opinions 10-13 and Rebuttal Opinion 6). Schneier’s decades of academic and  
9 industry experience qualify him to opine on the reasonable expectations that users would derive  
10 from Google’s user interfaces and related privacy disclosures. This Court has specifically found  
11 that “formal training in business process-focused software engineering, the design of user  
12 interface and registration pages, and user-experience design to ensure that users understand how  
13 their personal information will be used and disclosed when interacting with a web page” supplies  
14 a sufficient basis to “offer opinions on the issue of whether the design of [a] website would be  
15 likely to mislead or confuse a *typical* user.” *Berman v. Freedom Financial Network, LLC*, 400  
16 F.Supp.3d 964, 972 (N.D. Cal. 2019) (Gonzalez, Rogers, J.) (emphasis added). This Court’s  
17 decision in *Berman* rejects Google’s contention that “survey or other case-specific research on  
18 actual private browsing mode users,” Mot. 9, is required to testify about the understanding of a  
19 reasonable user. So long as Schneier does “not testify as to whether a particular user or group of  
20 users was confused or misled” without such a factual basis, *Berman* permits his testimony. 400  
21 F. Supp. at 972. And, as Google acknowledges, Schneier has made clear that he is not offering  
22 such opinions about particular class members. *See* Mot. 12 (quoting Schneier Tr. at 32:16-24).

23       *Third*, Opinions 7-14 properly cite internal Google documents to a lay a foundation for  
24 Schneier’s opinions. Schneier properly relies on Google documents to support his professional  
25 opinions about the adequacy of Google’s disclosures and the acceptability of its conduct. In any  
26 event, Google’s complaint that these opinions are “imbued with ... selective quotation and  
27 mischaracterization of Google documents” is a matter for cross-examination and refutation, not

1 exclusion. *Humetrix v. Gemplus*, 268 F.3d 910, 919 (9th Cir. 2001) (“To the extent Gemplus  
 2 sought to challenge the correctness of Humetrix’s experts’ testimony, its recourse is not exclusion  
 3 of the testimony, but, rather, refutation of it by cross-examination and by the testimony of its own  
 4 expert witnesses.”)

5 *Fourth*, Schneier’s opinions about the risks of data retention are relevant to the  
 6 offensiveness of Google’s conduct. Plaintiffs’ state-law privacy claims turn on the offensiveness  
 7 and unacceptability of Google collecting data from people who reasonably believe that it will not  
 8 do so when they are engaged in private browsing. (Opinions 6, 9 and Rebuttal Opinion 2) *See In*  
 9 *re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 606 (9th Cir. 2020). “Legally  
 10 recognized privacy interests” are not limited to “interests in precluding the dissemination or  
 11 misuse of sensitive and confidential information (‘informational privacy’)” but also include  
 12 “interests in making intimate personal decisions or conducting personal activities *without*  
 13 *observation*, intrusion, or interference (‘autonomy privacy’).”  
 14 *Hill v. National Collegiate Athletic Ass’n*, 865 P.2d 633, 654 (Cal. 1994). Google’s attempt to  
 15 reframe this case around what it does or doesn’t do with the private browsing mode data it collects  
 16 ignores the gravamen of Plaintiffs’ claims that Google was wrong to collect that data in the first  
 17 place.

18 *Fifth*, Schneier’s opinions are not unfairly prejudicial. Google claims that Schneier offers  
 19 “highly inflammatory statements that have absolutely no bearing on any issue in this case” Mot.  
 20 at 17. But many of the statements Google identifies are simply true, such as that Google receives  
 21 subpoenas from law enforcement for information and its policy is to divulge such information  
 22 when it is legally required. These facts are relevant to Plaintiffs’ claims for the same reasons  
 23 noted above. What has happened with other sources of data could happen to data that Google  
 24 collects about private browsing, and what could happen to that information is highly relevant to  
 25 Plaintiffs’ allegations about the offensiveness of Google’s misconduct—where Plaintiffs allege  
 26 that Google collects this sensitive information despite promising not to.

27 *Sixth*, Schneier is qualified to opine about Google’s incentives and services. Contrary to

1 Google's suggestion, Schneier is not opining on Google's intent. Mot. at 18. His opinions  
2 regarding what "Google counts on," its "incentives," what it is "motivated to ensure," and the  
3 like, are all structural observations about the market for online user data that Google does not  
4 substantively contradict. But to the extent Google disagrees, it can explain why through cross  
5 examination.

6  
7  
8 **IT IS SO ORDERED.**

9 DATED: \_\_\_\_\_

\_\_\_\_\_  
Honorable Yvonne Gonzalez Rogers  
United States District Judge